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Supreme Court of the United States.

No. ~~1782~~ 70-238

DuNORD CAFE, INC. AND
JOSEPH J. MANZELLA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Supreme Court of the United States.

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DuNORD CAFE, INC., ET AL,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinion Below.

The opinion of the court below (App. B) is not yet reported.

Jurisdiction.

The judgment by the court below was entered on May 5, 1971. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Whether the provisions of 26 U.S.C. § 7606 and 26 U.S.C. § 5146 (b) which authorize a retail liquor dealers

inspection of business premises also empower federal agents to search areas unconnected with the business.

2. Whether the District Court's reference to the Mafia during the criminal prosecution of an Italian-American defendant is sufficient to deprive the defendant of his right to a fair trial, and, therefore a violation of the Fifth Amendment.

Constitutional Provisions and Statutes.

United States Constitution, Amendment IV
United States Constitution, Amendment V
26 U.S.C. § 5146 (b) (Vol. 6, 1964 ed., p. 5594)
26 U.S.C. § 5205 (a) (2) (Vol. 6, 1964 ed., p. 5602)
26 U.S.C. § 5301 (c) (2) (Vol. 6, 1964 ed., p. 5615)
26 U.S.C. § 5301 (c) (4) (Vol. 6, 1964 ed., p. 5615)
26 U.S.C. § 7606 (Vol. 6, 1964 ed., p. 5802)
28 U.S.C. § 1254 (1) (Vol. 7, 1964 ed., p. 5958)

Statement.

After a jury trial, the petitioners were convicted on three counts of a five count indictment charging:

(a) in Count 1, possession of unstamped distilled spirits in violation of 26 U.S.C. § 5205 (a) (2);

(b) in Count 3, possession of liquor bottles which had been refilled in violation of 26 U.S.C. § 5301 (c) (2); and

(c) in Count 5, possession of liquor bottles, the contents of which had been altered in violation of 26 U.S.C. § 5301 (c) (4).[1]

On June 25, 1970, a motion for a new trial was filed and denied. On July 10, 1970, each defendant was fined $500. The defendant Manzella was also given a two months suspended sentence and placed on probation for one year; a timely notice of appeal was filed on July 14, 1970.

On the morning of June 17, 1969, A.T.&F. Agent Roland Porreca, accompanied by two other agents, conducted a retail liquor dealers inspection at the premises of DuNord Cafe, Inc., d/b/a The Golden Nugget, in Worcester, Massachusetts.

The agents identified themselves to Manzella [who indicated that he was the president of DuNord Cafe, Inc.] and then began to examine opened bottles behind the bar. Agent Porreca asked Manzella where he kept his stock of liquor. Manzella led him to the basement where Agent Porreca examined the stock on hand.[2] On the way back up to the bar, they passed a locked door. Manzella told the agent that it was a storage bin which was unconnected with the business, but Agent Porreca insisted that he had to open the door. In the room Porreca observed "a half gallon container with cherries in the bottom and a liquid". It was seized and offered at trial as Government's Exhibit No. 1. Agent Porreca then returned to the bar and conducted "reagent" tests on some open bottles (1 Tr. 25-27

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[1] Judgments of acquittal were entered on Counts 2 and 4.

[2] References ("__Tr.__") are to *Volume* and *Page* of the original transcript.

The preliminary tests indicated that seven bottles contained spirits other than the original contents (1 Tr. 28-29). These seven bottles were sealed and forwarded for laboratory analysis.

During a subsequent interview, Manzella told agents that he had the keys to the business and that he did most of the ordering. He denied any knowledge of anything being refilled (1 Tr. 35-36).

Ronald M. Holmes, Senior Chemist, Internal Revenue Service, testified that he examined Government's Exhibit No. 1 (the half-gallon jug containing liquid and cherries) and found it to be 82.8 proof ethyl alcohol (1 Tr. 64). He further testified that he examined the seven bottles seized from behind the bar and found some of them to be non-genuine (1 Tr. 61-64).

Reasons for Granting This Writ.

The court below upheld petitioners' convictions and stated that the appeal lacked merit, yet this case presents a timely issue in that it treats the far reaching question of the limits of a search incident to an examination of taxable objects. Petitioners raised the issue of an illegal search in the court below, but the court did not consider the question.

The excise tax levied on distilled spirits (hereafter simply "spirits") is an important source of revenue to the government. See (Annual Report of Commissioner of Internal Revenue (1967), p. 117). The legitimate use of federal power to protect the revenue and prevent evasion of the tax on spirits is not disputed. Thus in order to pro-

tect this revenue, Congress, in 1958, enacted 26 U.S.C. § 5146 (b). The purpose of this provision was explained in Report No. 2090 of the Committee on Finance of the Senate (3 U.S. Code Cong. and Adm. News 1958, p. 4526) as follows:

> "While existing law (26 U.S.C. § 7606) provides authority for the entry for purposes of inspection of premises where taxable articles are kept, this subsection gives specific authority to the Secretary (Treasury) or his delegate (Sec. 5146 (b)) to enter during business hours the premises (including Places of storage) of any dealer for the purpose of inspecting or examining . . . . any distilled spirits . . . kept or stored by such dealer on such premises. The purpose of this subsection is to *reaffirm* and clarify the authority of the Secretary. . . ."

A. THE SECRETARY DOES NOT HAVE THE POWER TO SEARCH AREAS UNCONNECTED WITH THE BUSINESS WITHOUT FIRST OBTAINING A SEARCH WARRANT.

In *Camara* v. *Municipal Court*, 387 U.S. 523, 540 (1967), this Court held that where a non-emergency situation existed, the appellant had a Fourth Amendment right to insist that the inspectors obtain a search warrant before making an area code-enforcement inspection of a dwelling. In *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967), this right was extended to "portions of commercial premises which are not open to the public". In *See*, supra, the property involved was a locked commercial warehouse. Petitioners contend that if there can be any distinction

drawn between a locked warehouse and a locked storage bin, then that distinction is purely volumetric and one which the law does not recognize.

The issue presented in this case is a logical extension of *Camara*, supra, *See*, supra, and *Colonnade Corp.* v. *U.S.*, 397 U.S. 72 1969). Petitioners do not dispute that the general rule in *See*, supra, at 545[3] is subject to the powers of inspection conferred by Congress under the liquor laws and is therefore not applicable here. This Court added in the *See* case that:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant". *Id.*, at 543. Cited in *Colonnade*, supra.

A businessman has no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper

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[3] The general rule laid down in *See* v. *City of Seattle*, 387 U.S. 541, at 545 (1967) holds that:

". . . . . administrative entry, without consent, upon the portions of commercial premises which are not open to the public may be compelled through prosecution or physical force within the framework of a warrant procedure".

authorization. There is no contention in this case that the defendant Manzella was advised that he had a right to refuse to open the storage bin, (*Colonnade*, supra) thus the government cannot reasonably contend that this was a search by "consent". A search of premises by "consent" is not lawful where "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right". *Johnson* v. *U.S.*, 333 U.S. 10, 13 (1948); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

Petitioners submit that powers of warrantless administrative inspection conferred by federal liquor laws do not include areas which are unconnected with the activity being supervised.[4] The search of such an area under the umbrella of statutory authority is impermissible, and should be considered a "significant intrusion" subject to warrants based upon probable cause. *Camara*, supra. Therefore, Petitioners' motion to suppress evidence (R 3) should have been allowed.

B. THE DISTRICT COURT'S USE OF THE WORD "MAFIA" PREJUDICED THE DEFENDANT.

In the memorandum and judgment of the court below, it was noted that at the time that the trial court alluded to the Mafia the purported character evidence being offered

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[4] See *U.S.* v. *Frisch*, 140 F. 2d 660, 662 (C.A. 5, 1944).

was quite inappropriate.[5] Petitioners do not controvert

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[5] As part of the defense, defendant Manzella called five character witnesses (2 Tr. 132-147). The last of the five, one George W. Burton, testified that "(a)round that neighborhood they speak pretty well of (Manzella)" (2 Tr. 146). In an effort to determine Burton's basis for the testimony given by him, the following occurred between the prosecutor and the witness (2 Tr. 146-147):

Cross-Examination by Mr. Davis

Q. People speak well of him; is that right?
A. As far as I can remember.
Q. Where have you heard anybody speak about Mr. Manzella at all?
A. Around through the neighborhood I have heard quite a few people where they have been down and they have asked him to donate and he has donated, and they said he was generous that way.
Q. So all you know he is a good guy, he donates to the local charities?
A. I wouldn't say charities.
Mr. Davis: No further questions.

Thereafter, on redirect-examination, the following occurred (2 Tr. 147):

Redirect Examination by Mr. Feldman

Q. What would you say?
Mr. Davis: Objection.
Mr. Feldman: It was his question, your Honor.
Mr. Davis: It has nothing to do with reputation, truth and veracity.
Mr. Feldman: It was his question.
The Court: What was the question?
Mr. Feldman: He said, "Do you donate to charities?" And Mr. Burton said, "I wouldn't say charities." I said, "What would you say?"
The Court: You are asking the witness what would he say? I don't know the sequence.
Mr. Feldman: Mr. Davis asked him about charities and he said he wouldn't say that. I then said, "What would you say, Mr. Burton?"
The Court: Is that reputation?
Mr. Feldman: I think that has a bearing on a person, yes.
The Court: It may be the Mafia. Next question.
Mr. Feldman: Your Honor, at this time the defense would rest.

this finding. Petitioners do contend that any reference to the "Mafia" in the criminal prosecution of an Italian-American defendant is highly prejudicial and sufficient *per se* to deny the defendant a fair trial. It is of no consequence, for the purpose of this appeal, that counsel failed to object to the use of the word "Mafia" because by its use the trial court introduced a highly inflammatory and irrelevant collateral issue, hence such a remark clearly constitutes "plain error". (Fed. Rules Crim. Proc., Rule 52 (b))[6]

In *Fernicola* v. *Farrar, Straus & Cudahy, Inc.*, 208 N.Y.S. 2d 305, 306 (1960), a libel action against the publisher of a book naming the plaintiff as an attorney for the "Mafia", the court stated that "the word or words in a given setting lend themselves to libel". The *Wall Street Journal* of February 23, 1971, reported that in July of 1970 the Justice Department had discontinued the use of the term *Mafia.* The obvious conclusion is that the word itself is highly prejudicial to a large ethnic group.

The inherent danger of permitting such a remark is that a jury, uninstructed to disregard the remark, is left alone to conjecture whether or not the facts upon which they are to rule are related to the illicit activities of a secret and evil organization. The possibility of similar prejudice would be equally present in the trial of a black youth where the trial court referred to the Black Panthers, or,

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[6] It should be noted that at the trial in the District Court, the petitioners' counsel consistently failed to make proper objections and, on the whole, demonstrated an inadequate comprehension of elementary rules of law. See Memorandum and Judgment. (App. B).

several years ago, in the trial of any person where a court officer alluded to the Communist Party.

In the absence of contravening indications that the effect of the remark was insignificant and "harmless beyond a reasonable doubt" (*Chapman* v. *California,* 386 U.S. 18 (1967), the remark must be considered plain error.[7]

Petitioners contend that this result is necessary to preserve their right to a fair trial as guaranteed by "due process" clause of the Fifth Amendment to the United States Constitution.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] The jury found the petitioners guilty as charged on all counts of the indictments that were submitted for their deliberation. (Counts 1, 3 and 5)

Appendix A

Relevant Docket Entries

1969

Sept. 30 Indictment returned.

Oct. 16 Appearance of Donald P. Feldman for defendant filed. Deft, with counsel, arraigned; Indictment read; deft pleads not guilty to each count. Order specifying methods and conditions of release, bond ($1000).

1970

May 12 Deft's motion of counsel to dis-appear filed. c/s

12 Deft's motion to suppress evidence filed. c/s

12 Lord, D. J. Case called for trial; deft set to bar to be tried; jury empaneled, jury sworn; indictment read; criminal jury trial begins; government opening; voir dire; motion to suppress evidence denied; evidence; adjourned to May 13, 1970 at 10 AM.

13 Ford, D. J. Criminal jury trial continues; government rests; deft's motion for judgment of acquittal filed; motion allowed as to counts 2 and 4; motion denied as to counts 1, 3 and 5; deft's opening; evidence; deft rests; adjourned to May 19, 1970 at 10 AM.

19 Ford, D. J. Criminal jury trial continues; arguments; charge; jury retires to deliberate; jury returns with verdicts.

19 Continued:
Count 1 — Guilty
Count 3 — Guilty
Count 5 — Guilty
verdicts recorded; jury discharged.

June 25 Deft's motion for a new trial filed. c/s

25 Ford, D. J. Deft before Court with counsel for hearing on pending motion and disposition; motion for new trial — denied.

July 2 Ford, D. J. Deft before Court with counsel for disposition; deft sentenced to a term of imprisonment of two months, sentence suspended and to pay a fine of $500 for each deft, probation for one year; execution of sentence stayed pending appeal.

14 Deft's notice of appeal filed. c/s

30 Statement of docket entries and original pleadings delivered to the court of appeals.

Indictment

(Returned September 30, 1969)

The grand jury charges:

Count One

On or about June 17, 1969, at Worcester, in the District of Massachusetts, the DuNORD CAFE, INC., a Massachusetts corporation d/b/a THE GOLDEN NUGGET, and JOSEPH JAMES MANZELLA of Worcester in said District, an agent or employee of said corporation, wilfully and

knowingly did possess a quantity of distilled spirits, required to be stamped under the provisions of Section 5205 (a) (2), Title 26, United States Code, that is, one-half gallons of distilled spirits, the immediate container thereof not having affixed thereto stamps evidencing the determination of the tax thereon or indicating compliance with the provisions of Chapter 51, Title 26, United States Code.

The grand jury further charges:

Count Three

On or about June 17, 1969, at Worcester in the District of Massachusetts, the DuNORD CAFE, INC., a Massachusetts corporation d/b/a THE GOLDEN NUGGET, and JOSEPH JAMES MANZELLA of Worcester in said District, an agent or employee of said corporation, the defendants, being persons who sell and offer for sale distilled spirits, did possess seven (7) liquor bottles, more or less, in which distilled spirits had been placed in violation of the provisions of paragraph (1) of Title 26, United States Code, Section 5301 (c); in violation of Title 26, United States Code, Section 5301 (c) (2).

The grand jury further charges:

Count Five

On or about June 17, 1969, at Worcester in the District of Massachusetts, the DuNORD CAFE, INC., a Massachusetts corporation d/b/a THE GOLDEN NUGGET, and JOSEPH JAMES MANZELLA of Worcester in said District, an agent or employee of said corporation, the

defendants herein, being persons who sell and offer for sale distilled spirits, did possess seven (7) liquor bottles, more or less, the original contents of which had been altered and increased in violation of the provisions of paragraph (3) of Title 26, United States Code, Section 5301 (c); in violation of Titl 26, United States Code, Section 5301 (c) (4).

A TRUE BILL,
[Illegible]
Foreman of the Grand Jury.

WILLIE J. DAVIS
Assistant United States Attorney

DISTRICT OF MASSACHUSETTS

September 30, 1969

Returned to the District Court by the Grand Jurors and filed 12:51 P.M.

FRANCES R. FOLEY
Deputy Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7673

UNITED STATES OF AMERICA,
Appellee,

v.

DuNORD CAFE, INC., ET AL.,
Defendants, Appellants.

Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

Memorandum and Judgment

Entered May 5, 1971

This appeal lacks merit. The defendants cafe and cafe owner were found guilty of various offenses arising out of offering for sale liquor in bottles in which it did not belong. Defendants' principal points relate to the allegedly improper conduct of the trial judge. The first matter is a remark responding to certain purported character evidence

offered by the defendant. The evidence was quite inappropriate, which was doubtless what sparked the response. No objection was made thereto at the time. The remark was insufficiently serious to constitute plain error. The remaining remarks allegedly "belittled" counsel. One was made at the side bar. The others were criticisms of flagrant leading of counsel's own witness. Counsel was not violating some esoteric rule, but an elementary one. It is quite proper for counsel to be admonished in front of the jury for violating this rule. Otherwise, a defendant can get the benefit of the violation on a free ride.

Finally, defendant complains of the court's failure to quote a portion of the statute relating to Count One which set up an exemption or special defense. No request was made for such a charge; no exception was taken to its omission, and, of critical present importance, nothing in defendant's argument to the jury related thereto. Nothing whatever alerted the trial court of the need of giving fuller instruction to the jury. We are not interested in this afterthought.

The judgment of the District Court is affirmed.

By the Court:

(S) Dana H. Gallup
Clerk

per, Aldrich, Ch. J.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-238

DUNORD CAFÉ, INC., & JOSEPH J. MANZELLA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the District of Massachusetts, petitioners were convicted of (Count 1) possessing unstamped distilled spirits, in violation of 26 U.S.C. 5205(a)(2); (Count 3) possessing liquor bottles which had been unlawfully refilled, in violation of 26 U.S.C. 5301(c)(2); and (Count 5) possessing bottles of liquor which had been diluted, in violation of 26 U.S.C. 5301(c)(4). Defendant Manzella was given a sus-

pended sentence of imprisonment for two months and placed on probation for one year. Both he and the corporate defendant were sentenced to pay a fine of $500 (Pet. App. 12). The court of appeals affirmed (Pet. App. 15-16).

1. One of five character witnesses for petitioner Manzella testified that people in the neighborhood spoke well of petitioner. On cross-examination the assistant United States attorney asked the witness if all he knew was that Manzella was a "good guy" who "donates to the local charities." The witness answered "I wouldn't say charities." "What would you say?" asked defense counsel on redirect. There was objection and a colloquy as to what this line of questioning had to do with reputation. The court said, "It may be the Mafia. Next question" (2 Tr. 146-147, Pet. 8, fn. 5). Viewed in context, the court's remark was clearly not a suggestion that Manzella was a member of the Mafia. Indeed, counsel made no objection and did not mention the remark in his motion for a new trial, which suggests that at the time the remark was made, no one interpreted it in the pejorative sense suggested by petitioner. In any event, this apparently inconsequential occurrence did not rise to the level of plain error.

2. Petitioners' other contention relates to the admissibility of the bottles which formed the basis of Count 1, a count not necessary to support the general suspended sentence and fine in this case.

On a motion to suppress evidence it was shown that on June 17, 1969, a federal agent and two police of-

ficers went to the Golden Nugget, a taproom operated in the City of Worcester, Massachusetts, by the corporate petitioner and by Manzella, president of the corporation. The officers first examined bottles on the bar (1 Tr. 9-10). There was a locked door near the ladies' room. According to the testimony of the agent, he did not directly order Manzella to open the door; however, Manzella, after a mild protest that there was nothing in the room which would interest the agent, was very cooperative and unlocked the door (1 Tr. 13-14). According to the testimony of Manzella, he told the officers it was all right to inspect the place, but when they came to the locked room, he told them it contained only his personal belongings and unlocked it only when ordered to do so (1 Tr. 17-20). The agent found and seized within the locked room an unstamped bottle which contained liquor and which was the basis of Count 1 (1 Tr. 14).[1] Other contents of the room included cartons, tires, an air conditioner, possibly dishes, knives and forks (1 Tr. 15). Manzella said that the items in this room were personal; that he catered for clambakes in the summer (1 Tr. 19). The court denied the motion to suppress (1 Tr. 20).

On appeal petitioners limited their contention as to the search and seizure to the factual claim, decided adversely to them, that this was a private storage room not within the business premises and that the contents of the bottles were not intended for sale.

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[1] The unstamped bottle contained alcohol and cherries and was claimed by Manzella at trial as his personal stock, given to him by a friend (1 Tr. 36-37, 64-65).

Here petitioners contend again that the locked room was unconnected with the business simply because of Manzella's self-serving testimony to that effect. The judge who heard the motion to suppress and the jury did not have to believe this testimony or the testimony that the contents of the unstamped packages kept in the storage room of the cafe were not intended for sale.

Petitioners conceded below the right of the agent to inspect and search the place of business. They urge here that the ruling below was in violation of *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541; and *Colonnade Corp.* v. *United States*, 397 U.S. 72. However, even assuming that the facts were as suggested by petitioners, none of these cases is relevant to the contention made in this case. *Camara* related to the right of a building inspector to enter a private dwelling without a warrant to ascertain whether there was compliance with building regulations. *See* involved a similar question as to business premises and fire regulations. The Court there expressly stated that its holding did not extend to "licensing programs which require inspections prior to operating a business or marketing a product" (387 U.S. at 546). This exclusion from the requirement of a warrant was again recognized in *Colonnade*, where the Court's ruling was explicitly placed on the use of force in breaking down a door. There was no force used here.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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